Supreme Court, U.S.
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No. 96-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

STATE OF MISSOURI,
Petitioner,

vs.

EMORY M. FUTO
Respondent.

On Petition for Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

Whether a criminal defendant who is not precluded from consulting with his attorney on any other matter relating to his trial and defense must also be allowed, under the Sixth and Fourteenth Amendments, to craft his own testimony by discussing it with his attorney during an overnight recess in his cross-examination.

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PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Opinion Below

The opinion of the Missouri Court of Appeals, Eastern District, reversing respondent's convictions is reported at 932 S.W.2d 808 (Mo. Ct. App., E.D. 1996), and is published in the Appendix at A-4. The mandate of the Court of Appeals ordering the cause to be remanded to the trial court for a new trial is included in the Appendix at A-1.

Jurisdictional Statement

The Missouri Court of Appeals, Eastern District, reissued its opinion on November 27, 1996, after the case was retransferred to it by the Missouri Supreme Court (A-4). Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.01, this petition for writ of certiorari was required to be filed by petitioner within ninety days. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Constitutional and Statutory Provisions

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property without due process of law . . . .

Statement of the Case

A jury found that the respondent, Emory M. Futo, was guilty of four counts of murder in the first degree, §565.020, RSMo 1994. Futo was sentenced to four consecutive sentences of life in prison without eligibility for probation or parole for the murders of his father, mother, and two brothers. The circumstances of Futo's offenses were summarized in the opinion of the Missouri Court of Appeals, Eastern District. *State v. Futo*, 932 S.W. 2d 808, 811-812 (Mo. Ct. App., E.D. 1996) (A-4 to A-9).

The Court of Appeals reversed Futo's convictions and sentences based on his claim that the government interfered with his right to effective assistance of counsel. The event on which he relies occurred at the end of a trial day, while Futo's cross-examination was still underway. Throughout the trial, the court had imposed the usual rule precluding witnesses from conferring with counsel during recesses prior to or during the course of cross-examination. At the end of the trial day in which Futo took the witness stand, his counsel asked whether the court would maintain consistency by precluding Futo from discussing his testimony with his attorney before his cross-examination by the state continued the next morning. *Id.* at 812-815; (A-9 to A-10). The defense counsel's invitation and the court's acceptance of it are reflected in the following discussion, which occurred on the record but out of the hearing of the jury:

> [DEFENSE COUNSEL]: I'll sum it up, you tell me when I'm wrong. I have briefly off the record indicated to the Court, the Court has had admonitions to counsel for the State, and I assume their investigators as well, concerning discussions with witnesses about their testimony and about any other

testimony that may have occurred before or after. I had asked the Court whether or not the similar admonition applied between me and the defendant, the Court indicated that there was and that I would be ordered not to discuss with him the nature of his testimony or anything else concerning his testimony and I indicated to the Court I would abide with that ruling. I wanted to put on the record that I have concerns and I object to the ruling based on the Sixth Amendment privileges the defendant has to consult with counsel and communicate with counsel.

THE COURT: Do you want to make a comment about that?

[THE PROSECUTOR]: Judge, I believe that once they get on the witness stand he has to be treated as if he never gets off until it's completed, so, I don't know.

THE COURT: I agree.

[THE PROSECUTOR]: I don't think that the Sixth Amendment right to counsel is violated in any way because once he starts to testify, he is up there until he gets done. So, I don't believe it does violate anything.

THE COURT: I agree with the State's position. I'll direct counsel, just like I've directed other counsel, not to discuss the testimony with your client.

(A-38 to A-39). Later, Futo's counsel said that he was complying with the trial court's ruling, but that he believed that its ruling interfered with Futo's right to counsel (A-39 to A-40). The trial court stated that it was sticking with its prior ruling and that it had been telling all witnesses, including the defendant, not to discuss their testimony with anyone during recesses (A-40).

Futo's claim concerning the denial of his right to effective assistance of counsel was preserved for appeal by being raised at trial and in the motion for a new trial (A-38 to A-41).

The Missouri Court of Appeals, Eastern District, accepted Futo's claim that the state had violated his right to effective assistance of counsel, and reversed his convictions on March 26, 1996. *Id.* at 808 (A-4). Petitioner asked the Court of Appeals to rehear the appeal or to transfer the case to the Missouri Supreme Court; that request that was denied on May 6, 1996. (A-36). Petitioner then filed with the Missouri Supreme Court a motion for transfer (A-33). That motion was granted on June 25, 1996 (A-33). On November 19, 1996, the Missouri Supreme Court retransferred this case to the Court of Appeals (A-32). On November 27, 1996, the Court of Appeals reinstated its previous opinion (A-3). The Court of Appeals' December 2, 1996, mandate remanded the case to the trial court for a new trial (A-1).

Reasons for Granting the Writ

This Court should grant the petition for a writ of certiorari for two reasons.

First, the Missouri Court of Appeals has decided an important question of federal law that has not been but should be decided by this Court. This Court has previously addressed related questions regarding the right of a criminal defendant to confer with counsel to assist his defense during recesses in the trial. But the holdings in the principal cases deal solely with the effect of varying durations of recesses. This Court has not addressed an instance -- regardless of the *length* of the recess -- where the trial court permitted the defendant and his counsel, during a recess in the midst of cross-examination, to address the entire range of tactical, strategic, and evidentiary issues, excepting only the defendant's own testimony. The Court of Appeals concluded that during an overnight recess, criminal defendants must not only be allowed to confer with counsel on issues of strategy, tactics, and evidence generally, but also on the specifics of the defendants' own testimony -- a conclusion that opens, without support from this Court's prior opinions, a door to abuse, and that deserves the attention of this Court.

Second, Missouri Court of Appeals has decided an important federal question in a way that conflicts with the decision of courts in other states. The Missouri court followed precedents from the District of Columbia and Fourth Circuits, and from New Jersey. But contrary rulings have been handed down in Maryland, Delaware, and New York. Those trying criminal cases in the remaining eight regional federal circuits and in the remaining forty-five states deserve the kind of clarity that only this Court can give in defining the constitutional rights of criminal defendants.

1. The opinion of the court below creates a significant new constitutional principle -- one that is not supported by either *Geders v. United States* or *Perry v. Leeke*, that is easily subject to abuse, and that will interfere with the search for truth.

The question here is a basic one, dealing with an important aspect of a criminal defendant's rights during trial. And the question "is not only important, but also one that frequently arises." *Perry v. Leeke*, 488 U.S. 272, 277 (1989). In *Perry*, this Court held that "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. But in this case, the court of appeals has held that in the instance of an overnight recess in the midst of cross-examination, a criminal defendant has an unfettered right to have his counsel help craft the defendant's answers. That rule falls outside the scope of the issue addressed in the holdings of this Court in *Perry* and *Geders v. United States*, 425 U.S. 80 (1976). But it is of equal importance.

The basic rule applied by the trial court was hardly novel. Nor was its application to a criminal defendant, for when a defendant "assumes the role of witness, the rules that generally apply to other witnesses -- rules that serve the truth-seeking function of the trial -- are generally applicable to him as well." *Perry*, 488 U.S. at 282. Thus the court of appeals was not without precedents to cite. And it relied on two both *Geders* and *Perry*. *State v. Futo*, 932 S.W. 2d at 813-815 (A-11 to A-16).

Geders and *Perry*, like this case, both involved communications with counsel. In each case a criminal defendant was on the witness stand being cross-examined at the time of the recess. And in each case the trial court

restricted the defendant's ability to communicate with counsel during a recess -- all like what happened to Futo. But both *Geders* and *Perry* dealt only with bans on *all* consultation between criminal defendants and their lawyers. In neither case was this Court faced with defendants' alleged right, during a recess in the state's cross-examination of the defendant, to discuss that very testimony. Thus, although the line between *Perry* (in which a restriction was permitted) and *Geders* (in which it was not) "is a thin one," *Perry*, 488 U.S. at 686, this case does not fall along that line.

In *Geders*, this Court heard a case in which the trial judge had decided that it was "better that [the defendant] not talk to [his counsel] about anything" during an overnight recess. 425 U.S. at 82. This Court held that the trial judge had gone too far. Although communications between counsel and nonparty witnesses could be banned, the Court observed that there was a difference between such witnesses and criminal defendants: "A nonparty witness ordinarily has little, other than his own testimony, to discuss with trial counsel; a defendant in a criminal case must often consult with his attorney during trial." *Id.* at 88. The subject of the consultation was unimportant in *Geders*, for the trial court precluded consultation regardless of the topic.

This Court addressed a similarly broad ban on consultation in *Perry v. Leeke*. Again, the defendant was precluded from talking "to anyone, including his lawyer," during a fifteen minute break in his testimony. 488 U.S. at 274. The difference between *Perry* and *Geders* was not the extent of the consultation bar, but only its duration. This Court recognized that when the trial court imposes a complete ban on communication between defendant and counsel, the line between a fifteen minute and an overnight recess is "a line of constitutional dimension." *Perry*, 488 at 280. Thus the Court upheld the conviction in *Perry*, recognizing that by

precluding a defendant from any consultation with his attorney whatsoever for fifteen minutes the government did not unconstitutionally interfere with the defendant's right to conduct his defense.

Implicit in both *Perry* and *Geders* is a recognition (a) that criminal defendants, by choosing to take the stand, are subject to restrictions on their ability to have counsel color their testimony on cross-examination, and (b) that criminal defendants are subject to different rules than are nonparty witnesses when it comes to discussion of trial strategy and tactics and to providing information to counsel that is necessary "to make independent decisions about how to conduct the defense" of the case. *Strickland v. Washington*, 466 U.S. 668, 686 (1984), *quoted with approval*, *Perry*, 488 U.S. at 281. But although this case may be decided based on the same concerns that were at issue in the divergent opinions in *Perry* and *Geders*, it is not ruled by either holding. Again, this case addresses the distinct issue of the scope, not the duration of the trial court's order restricting communications during cross-examination.

This issue is important because the context in which it arises, cross-examination, is so critical to our judicial system. Thus in *Perry* this Court emphasized that "[t]he importance of cross-examination to the English judicial system, and its continuing importance since the inception of our judicial system in testing the facts offered by the defendant on direct, . . . suggests that the right to assistance of counsel did not include the right to have counsel's advise on cross-examination." 488 U.S. at 283 n.7. This Court further explained the rationale for the "common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed":

Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves truthful statements based on their own recollections. The defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration. Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses--rules that serve the truth-seeking function of the trial--are generally applicable to him as well.

* * *

[I]t is simply an empirical predicate of our system of adversary rather than inquisitorial justice that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney. "Once a defendant places himself at the very heart of the trial process, it only comports with basic fairness that the story presented on direct is measured for its accuracy and completeness by uninfluenced testimony on cross-examination." *United States v. DiLapi*, 651 F.2d 140, 151 (CA3 1981) (Mishler, J., concurring), *cert. denied* 455 U.S. 938 (1982).

Perry, 488 U.S. at 282-283. How the question posed by this case is answered will directly affect the success of our quest for "uninfluenced testimony on cross-examination." Although *Geders* and *Perry* addressed a critical issue in defining the parameters of that quest, neither case answered this new and important question.

The Court also recognized in *Perry* that a showing of prejudice is not required when a Sixth Amendment claim of governmental interference with the right to counsel is raised. 488 U.S. at 280. Since prejudice is not a factor, it does not matter how long the recesses in a defendant's testimony last if the defendant is merely precluded from discussing his testimony with his counsel during those recesses. The only reason that this Court discussed the length of the recess in *Perry* was that it decided that the *blanket ban* on discussion did not warrant the reversal of the defendant's conviction in that case, because the short length of time involved in the recess in that case made it virtually certain that any discussion between the defendant and his attorney would have related to the ongoing testimony, and the defendant did not have a right to discuss that testimony while it was in progress. 488 U.S. at 283-284.

However, the issue of whether a criminal defendant has the right to discuss *his testimony* with his counsel during long recesses in his testimony (those longer than fifteen minutes) has never been directly addressed by this Court. That question, like the related ones addressed in *Geders* and *Perry*, arises frequently -- certainly any time that a cross-examination extends beyond a single trial day, and probably when it extends past the lunch hour. The issue will arise more frequently if the court of appeals decision stands, for defense counsel will learn to take advantage of the court's new rule by manipulating schedules and length of direct examination to increase the likelihood of an lengthy recesses.

Without a resolution of the question by this Court, trial judges are unable to manage their courtrooms and prosecutors are unable to use the tool of cross-examination in a manner that best tests the truth of the testimony offered by criminal defendants.

(2) The opinion of the court below conflicts with the decisions of courts in other states.

Appellate courts across the United States have faced fact patterns like those presented here -- and have reached conflicting results.

Some appellate courts have approved of orders preventing defendants from discussing their testimony with their counsel during long recesses in their testimony, including overnight recesses. Those courts have decided, like this Court did in *Perry*, that defendants do not have the right to discuss their testimony with their counsel during breaks in that testimony. *Perry*, 488 U.S. at 281-282; *Wooten-Bey v. State*, 568 A.2d 16 (Md. 1990); *Bailey v. State*, 422 A.2d 956, 957-963 (Del. 1980); *People v. Enrique*, 165 A.D. 2d 13, 18-20 (N.Y. Sup. Ct. 1991), *affirmed* 600 N.E. 2d 229 (N.Y. 1992); *People v. Foust*, 192 A.D.2d 718 (N.Y. Sup. Ct. 1993); *Snyder v. State*, 657 A.2d 342, 356-357 (Md. Ct. App. 1995). In *Webb v. State*, 663 A.2d 452 (Del. 1995), the court emphasized that "[t]he fortuitous intervention of an overnight recess during cross-examination of a defendant should not be an occasion for coaching which could not otherwise occur." *Id.* at 460 (emphasis added).

But other courts -- like the court of appeals in this case -- have reversed convictions when trial judges refused to allow such "occasions for coaching." *E.g.*, *United States v. Cobb*, 905 F.2d 784 (4th Cir. 1990), *cert. denied*, *Hatcher v. United States*, 498 U.S. 1049 (1992); *State v. Fusco*, 461

A.2d 1169 (N.J. 1983); *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986). Missouri, by following that line, has exacerbated the conflict.

Nothing in modern trial procedure will reduce or eliminate the number of times a prosecutor must resume cross-examination of a criminal defendant after a lunch hour or the next morning. Thus, the situation that Futo's counsel provoked will occur again and again, and court after court will have to choose between the conflicting lines of authority. The differences of opinion among courts that must ensure the integrity of testimony while attempting to prevent constitutional error will continue to arise so long as the courts lack guidance from this Court as to how to adapt the *Geders* and *Perry* holdings to issues of scope rather than duration.

Conclusion

For the foregoing reasons, petitioner prays the Court issue a writ of certiorari and reverse the judgment of the Missouri Court of Appeals, Eastern District.

Respectfully submitted,

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